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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

IN RE: JULY 1979 TERM SPECIAL GRAND JURY
IN THE MATTER OF JAMES J. DONOHUE

UNITED STATES OF AMERICA,
Respondent,

v.

JAMES J. DONOHUE,
Petitioner,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

A. Does the Fifth Amendment Shield an Individual from Compulsory Production of a Non-Business Document Written by Him and Alleged to be in His Possession Where the Existence of the Document is in Dispute and the Act of Production in Itself Involves Testimonial Incrimination?

B. Does 18 U.S.C. § 1826 Permit the Incarceration of a Person Who Testifies that He is Unable to Produce a Subpoenaed Document?

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OPINION BELOW

The unpublished opinions of the United States Court of Appeals for the Fourth Circuit and the United States District Court for the District of Maryland appear in the Appendix hereto.

II.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on April 10, 1981. A timely petition for rehearing *en banc* was denied by that Court on April 28, 1981, and this Petition for Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

III.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. United States Constitution — Amendment V. "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."

2. 28 U.S.C. § 1826

"Recalcitrant witness

(a) Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of—

(1) the court proceeding, or

(2) the term of the grand jury, including extensions, before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months."

IV.

STATEMENT OF THE CASE

James J. Donohue is currently incarcerated for civil contempt pursuant to 28 U.S.C. § 1826 because of his failure to produce a document in response to a subpoena issued to him by a federal grand jury in the District of Maryland.

On or about November 9, 1979, a federal grand jury sitting in the District of Maryland issued a subpoena duces tecum addressed to "Custodian of Records, James J. Donohue and Associates, Inc." The sole stockholder and sole employee of James J. Donohue and Associates, Inc. is Mr. James J. Donohue. Mr. Donohue appeared in response to the subpoena, turned over the materials summoned by the grand jury and prepared a receipt acknowledging production of those materials. Both the Government and Donohue kept a copy of the receipt.

On October 20, 1980, nearly a year later, an Assistant United States Attorney for the District of Maryland wrote to Mr. Donohue personally and advised him that he was the subject of a federal grand jury investigation "into tax evasion and tax perjury, and other matters in possible violation of federal criminal law." In the letter, Mr. Donohue was asked to produce voluntarily a number of items, including his diaries for the years 1973 to 1979. In response to the request, Mr. Donohue had his then attorney meet with an agent of the Internal Revenue Service. At this meeting, a number of the requested items were produced; however, only the diary for 1979 was forthcoming. Mr. Donohue's attorney advised the agent that the other diaries sought had previously been given to Government representatives in response to the subpoena issued in November, 1979. The attorney produced a photocopy of a receipt supplied to him by Mr. Donohue.

That receipt listed 20 items as having been turned over to the grand jury in 1979. The 20th item read as follows:

"20. Daily Diarys [sic]: 1973-74-75-76-77-78." The attorney represented on behalf of his client, Mr. Donohue, that this photocopy was the receipt Mr. Donohue had received from Government representatives in 1979. When this copy of the receipt was compared with a copy retained by the Government, it appeared that the Government's copy listed only 19 items, omitting the diaries in question.

Understandably intrigued by the discrepancy between the two receipts, the grand jury issued a subpoena to Mr. Donohue on November 7, 1980, seeking "any and all originals and copies" of the receipt prepared in connection with the 1979 production of subpoenaed materials. The new subpoena also sought any and all diaries or calendars maintained by Mr. Donohue for the years 1973 to 1978.

Mr. Donohue moved to quash the 1980 subpoena duces tecum, alleging that it violated his Fifth Amendment right against self-incrimination. In response to the motion to quash, the District Court ruled that the diaries which were sought by the subpoena were personal in nature and, accordingly, quashed that portion of the subpoena. The Court further ruled that the receipt sought by the Government was not subject to Fifth Amendment protection. The District Court concluded that the receipt was a corporate document and not protected by the Fifth Amendment. Alternatively, the Court concluded that, even if the document was personal to Mr. Donohue, its production did not involve testimony about any matters which the Government could not prove independently. Accordingly, the Government issued a new subpoena to Mr. Donohue as custodian of records for James J. Donohue and Associates, Inc. to appear before the grand jury on February 26, 1981 and to produce the 1979 receipt. Mr. Donohue appeared as scheduled. When asked to produce the receipt, Mr. Dono-

hue sought to make a statement, but was cut short by the Assistant United States Attorney and asked to respond only to the question of whether he had the receipt called for by the subpoena. Mr. Donohue replied that he did not have it. The parties returned to court and a hearing was held pursuant to *In re Hitson*, 177 F. Supp. 834 (N.D. Cal.), *rev'd on other grounds sub. nom., Shane v. United States*, 283 F.2d 355 (9th Cir. 1960). At the hearing, Mr. Donohue was called as a witness, and in response to the Court's questions, reiterated that he did not have the receipt and therefore could not produce it. The Government submitted a notice to show cause why Mr. Donohue should not be cited for contempt of court pursuant to 28 U.S.C. § 1826.

A contempt hearing was held on Friday, March 13, 1981. At that hearing, Mr. Donohue was questioned by the Court and claimed that he never received the original of the receipt when he turned over documents in 1979; that he had received a photocopy of the receipt which contained 20 items, rather than 19 items, the twentieth item reflecting the submission of his diaries for 1973 through 1978. This photocopy was the document turned over by his attorney at Mr. Donohue's direction in response to the Government's letter of October 20, 1980. Mr. Donohue's testimony was in conflict with that of the agent who had signed the receipt in 1979. The agent claimed, in essence, that he had returned the original receipt to Mr. Donohue and had retained a copy for the Government, which had but 19 items on it. The District Judge disbelieved Mr Donohue and found that Mr. Donohue still retained the original receipt.

On March 17, 1981, the District Court entered an order finding Mr. Donohue in contempt under 28 U.S.C. § 1826 and ordered him incarcerated for the life of the grand jury or any extension thereof, but not to exceed 18 months, unless he produced the receipt. A timely appeal was filed.

On April 10, 1981, the Fourth Circuit affirmed the District Court in a single paragraph *per curiam* opinion to the effect that the District Court was not clearly erroneous in its finding that Mr. Donohue had the receipt called for by the subpoena. A petition for rehearing was timely filed, which was denied on April 28, 1981. On May 18, 1981, the District Judge entered an order directing that Mr. Donohue report for incarceration on June 1, 1981. He has been incarcerated since that date.[1]

V.

REASONS FOR GRANTING THE WRIT

A.

THE WRIT OF CERTIORARI SHOULD BE GRANTED IN ORDER TO RESOLVE THE CONFLICT AMONG THE CIRCUITS RELATIVE TO THE SCOPE OF FIFTH AMENDMENT PROTECTION AGAINST COMPULSORY PRODUCTION OF NON-BUSINESS DOCUMENTS WHEN THE ACT OF PRODUCTION IS IN ITSELF INCRIMINATING.

This case affords the Court the opportunity to answer the question left open in *Fisher v. United States*, 425 U.S. 391, 414 (1976) and its progeny, namely: the scope of Fifth Amendment protection afforded to an individual against compulsory production of a non-business document allegedly in his possession where the existence or possession of the document is denied by the individual and where production of the document would be the equivalent of a confession of criminal conduct. This issue is the significant outstanding Fifth Amendment question remaining unresolved after this Court's trilogy of decisions in *Couch v. United States*, 409 U.S. 322 (1973); *Fisher v. United States, supra*, and *Andresen v. Maryland*, 427 U.S. 403 (1976).

Resolution of this issue has split the Circuits. As Chief Judge Coffin observed in *In Re Grand Jury Proceedings (United States)*, 626 F.2d 1051, 1056 (1st Cir. 1980):

[1] Petitioner's application for a stay pending review on a writ of certiorari was subsequently filed with this Court and was denied by the Chief Justice and by Mr. Justice Brennan.

"Our difficulty has not been with identifying the existence of the [subpoenaed individual's] privilege, but with fashioning a remedy that would secure to him his right without preventing the government from gaining access to the records' contents, in which he has no constitutionally protected interest. Harmonizing the government's right of lawful access to the contents of personal business records with the possessor's right not to have the testimonial implications of his submission used against him has proven to be the most perplexing aspect of applying *Fisher*. Some courts seem to allow invocation of the Fifth Amendment to defeat entirely a subpoena addressed to the owner and possessor of personal business records. *See United States v. Beattie*, 541 F.2d 329 (2d Cir. 1976); *United States v. Helina*, 549 F.2d 713 (9th Cir. 1977). Other courts have discounted the significance of compelled authentication and have allowed the government to subpoena the records, at least in certain circumstances, without requiring any safeguards for the witness. *See United States v. Authement*, 607 F.2d 1129-1131-32 (5th Cir. 1979) (per curiam); *Witte v. United States*, 544 F.2d 1026 (9th Cir. 1975); *Fagan v. United States*, 545 F.2d 1005, 1007 (5th Cir. 1977) (dictum)."

More recently, Judge Wisdom, writing for the Fifth Circuit in *United States v. Davis*, 636 F.2d 1028, 1041 (5th Cir. 1981) observed:

"[c]ourts have differed over how to deal with the tacit authentication resulting from the summonee's implied affirmation that the papers delivered are the papers demanded. At least one Court has suggested that it might justify complete refusal to comply with the summons. *In re Katz*, 2 Cir. 1980, 623 F.2d 122, 125-26. Some seem to ignore it entirely. *United States v. Praetorius*, 2 Cir. 1980, 622 F.2d 1054, 1062-63; *United States v. Osborne*, 9 Cir. 1979, 561 F.2d 1334, 1339. One Court rejects our *Authement* principle [that it should not be a ground for refusing to produce documents as long as the fact of compliance with the summons is not introduced into evidence at the

> incriminated party's trial] as tantamount to a 'judicial grant of immunity without statutory authorization', but permits compelled production as long as the government grants immunity against use of the fact of compliance. *In Re Grand Jury Proceedings (United States)*, 1 Cir. 1980, 626 F.2d 1051, 1057-58."

These conflicts justify the grant of certiorari to review the judgment of the Fourth Circuit below.

The District Court offered alternative grounds for its holding that the original of the October, 1979 receipt was subject to compulsory production; namely, that the document was corporate and not personal or, alternatively, that even if the document was personal, its production did not involve any testimonial communication. We respectfully submit that this conclusion was incorrect in both instances.

First, it is clear that the receipt which the Government sought to subpoena is a personal rather than a corporate document. One must recall that the corporation in question, "James J. Donohue and Associates, Inc." had but one stockholder and one employee, namely James J. Donohue.

The personal, as distinguished from the corporate, nature of the 1980 subpoena is manifest in several respects. First, a comparison of the 1979 subpoena with the 1980 subpoena reveals that while both are addressed to the "Custodian of Records", the earlier subpoena is addressed to "James J. Donohue and Associates, Inc.", while the 1980 subpoena was not directed to the corporation but to James J. Donohue. Moreover, the only other materials sought by the 1980 subpoena were Mr. Donohue's diaries for 1973 to 1978, documents which are clearly personal in nature and found to be personal to Mr. Donohue by the District Court below.

In addition, it is clear that when Mr. Donohue was subpoenaed in 1980 personally, he was now the target of the investigation. The Government believed and, indeed, continues to believe, that Mr. Donohue added item 20 to the receipt after he had turned over 19 items to the grand jury in 1979 in order to avoid having to turn over his personal diaries for 1973 to 1978. Accordingly, the "advice of rights" form attached to the 1980 subpoena advised Mr. Donohue that the grand jury was now investigating him for, *inter alia*, obstruction of justice (18 U.S.C. § 1510) and false statement to an IRS agent (26 U.S.C. § 7207). Both of these crimes in this context were acts allegedly engaged in by Mr. Donohue personally, to protect his own exposure for tax offenses, as distinguished from activities engaged in by him in a corporate capacity.

In the alternative, the District Court concluded that even if the document was viewed as Mr. Donohue's personal record, it was not subject to Fifth Amendment protection because, in the Court's view, production would not involve testimony about any matters which the Government could not prove independently. We submit that this is incorrect factually: production of the original receipt by Mr. Donohue would be tantamount to a confession that he has committed crimes ranging from obstruction of justice through false statement to an Internal Revenue agent, and up to and including perjury. The Government has no such confession in hand and, indeed, has not seen fit to charge Mr. Donohue with the commission of any criminal act. In any event, the legal answer to Judge Murray's ruling was set forth in Judge Coffin's opinion in *In Re Grand Jury Proceedings (United States), supra*, 626 F.2d at 1056-57:

> "If one recognizes, however, that the subpoenaed party does have a constitutional privilege of some dimension, reliance on the triviality or cumulativeness of the compelled evidence to dispel the threat of

> constitutional violation seems inappropriately facile. We acknowledge that the government often may have no need to authenticate the records by reference to the party's compliance with the subpoena, see *United States v. Authement, supra*, 607 F.2d at 1132; indeed, in the case before us the government could probably authenticate the records through the testimony of the secretary who made the record entries under the doctor's direction. Nonetheless, if the government can use the compelled obedience to prove an incriminating fact, or to discover other incriminating evidence, the party's constitutional right remains in jeopardy. *See Fisher v. United States, supra*, 425 U.S. at 428-49, 96 S. Ct. at 1589-1590 (Brennan, J., concurring)."

In *Fisher*, this Court had no need to address itself to the Fifth Amendment implications of the compelled production of a document, the existence of which is in dispute. The subpoenaed documents in Fisher were accountant's workpapers whose existence was described by the Court as a "foregone conclusion." In the instant case, by contrast, the very existence of the putatively incriminating receipt is hotly disputed. The Courts of Appeals, as we have demonstrated, have split in their treatment of the issue. In light of the fact that this Court has not had occasion to address itself to this issue since the decision in *Fisher*, and given the conflict in the Circuits as to the question, there are compelling reasons why definitive guidelines in this area should now be marked by this Court.

B.

THIS CASE PRESENTS IMPORTANT QUESTIONS CONCERNING THE OPERATION OF 28 U.S.C. § 1826, A NEW STATUTE NOT PREVIOUSLY CONSTRUED BY THIS COURT.

The manner in which 28 U.S.C. § 1826 has been used in this action is an issue appropriate for review by this Court. Research has disclosed no reported case where a witness has testified at length regarding his inability to produce a document, has been subjected to cross-examination, and

has still been incarcerated. There have been cases where the explanation has been viewed as no explanation, e.g., *Sigety v. Abrams*, 632 F.2d 969 (2d Cir. 1980), but *Sigety* did not involve 28 U.S.C. § 1826, and Mr. Donohue gave an explanation (just cause) for his inability to comply.

28 U.S.C. § 1826 is a new statute and has not been construed by this Court. Surely it cannot operate to incarcerate witnesses simply because the witness loses the credibility battle with the Government. It is to be expected that credibility will be on the side of the Government. To allow incarceration under these facts is to convict Mr. Donohue for perjury without the protection of indictment, jury trial, and so forth. It is submitted that this course of action cannot be supported. 28 U.S.C. § 1826 was intended to codify the law of civil contempt and to provide additional weapons against organized crime. It has become in Mr. Donohue's case a means of imprisonment without trial.

The result in his case stands in sharp contrast to similar cases in the other circuits. *See, e.g., U.S. v. Rizzo*, 539 F.2d 458 (5th Cir. 1976). This case will thus present important issues involving the proper use and reach of 28 U.S.C. § 1826.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari.

Respectfully submitted,

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APPENDIX A

In the United States District Court
for the District of Maryland

Civil HM 81-113

In re: July 1979 Term Special
Grand Jury (Donohue)

MEMORANDUM

On November 17, 1980, the United States government issued a grand jury subpoena to James J. Donohue, custodian of records, requiring Mr. Donohue to produce certain receipts and diaries. Asserting his Fifth Amendment privilege not to incriminate himself, Mr. Donohue filed a motion to quash the subpoena with this court on November 14, 1980.

Counsel for Mr. Donohue and for the government appeared before the court on November 14, 1980 to present their arguments regarding Donohue's motion to quash. Donohue had not yet appeared before the grand jury at that time. Following the procedures set forth in *In re Hitson*, 117 F. Supp. 834 (N.D. Cal.), *rev'd on other grounds sub nom. Shone v. United States*, 283 F.2d 355 (9th Cir. 1960), this court directed the parties to proceed before the grand jury, where the government questioned Donohue about the receipt and diaries sought by its subpoena. Mr. Donohue refused to respond, asserting his Fifth Amendment privilege. The court reconvened and, after further argument, reached the tentative conclusion that the receipt sought by the government was protected by the privilege, but that further evidence was necessary to reach a determination about the diaries. Consequently, the court scheduled an evidentiary hearing and, at the

governments request, agreed to reconsider its initial holding regarding the receipt. Having considered the evidence and legal arguments presented by the parties, the court is now prepared to rule on Donohue's motion to quash.

I. The Receipt

On October 29, 1979, the government served a grand jury subpoena duces tecum directed to the custodian of records for James J. Donohue and Associates, Inc., calling for certain documents to be produced on November 9, 1979. Donohue submitted a number of documents to the government in response to this subpoena, and also presented a previously prepared typed receipt listing the documents produced.[1] The government contends that this receipt listed nineteen categories of documents, and that although it retained a photocopy of the receipt, it returned the original, executed by Internal Revenue Service Special Agent James May, to Mr. Donohue.

On October 20, 1980, the government wrote to Mr. Donohue and requested that he produce various documents, including diaries for the years 1973 through 1979. Donohue, following receipt of this letter, retained an attorney, Dean Barron, to represent him with respect to the government's grand jury investigation. On November 3, 1980, Mr. Barron, on Donohue's behalf, submitted several documents to the government, including Donohue's diary for 1979. In addition, Mr. Barron asserted that Donohue believed he had already turned over to the government his diaries for the years 1973 through 1978, and then produced a photocopy of a receipt for documents submitted to the government on November 9, 1979.[2] This receipt listed *twenty* categories of documents, the last of which reads, "Daily Diaries: 1973-74-75-76-77-78."

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[1] The government contends that Government Exhibit 3 is a copy of this receipt.

[2] Government Exhibit 2.

The government now has in its possession two photocopies of receipts for documents turned over by Donohue to the government on November 9, 1979; the receipts are identical except that the first lists nineteen items and is not signed, whereas the second receipt lists twenty items and contains the dated signature of I.R.S. Special Agent May under the words "Receipt Acknowledged." By its subpoena dated November 7, 1980, the subpoena which is the subject of Donohue's pending motion to quash, the government seeks the original receipt.

The government proffers two legal bases to support its position that production of the receipt in question can be compelled without violation of Donohue's constitutional rights. First, the government contends that the receipt is a corporate, as opposed to personal, document, and therefore does not come within the scope of the protection of the Fifth Amendment. Second, the government asserts that even if the receipt is found to be a personal document, its compelled production would be in no way testimonial, and therefore, under the holding of the Supreme Court in *Fisher v. United States*, 425 U.S. 391 (1976), the privilege against self-incrimination would not apply. The court finds merit in both arguments.

In *Bellis v. United States*, 417 U.S. 85 (1974), the Supreme Court cited a long line of precedent to support the proposition that

> an individual cannot rely upon the privilege to avoid producing the records of a collective entity which are in his possession in a representative capacity, even if these records might incriminate him personally. This doctrine was first announced in a series of cases dealing with corporate records.

Id. at 88. Donohue counters that even if the receipt involved in this case is found to be a corporate document, the *Bellis* rule should not apply. This is so, contends Donohue, because James J. Donohue and Associates, Inc. is not a collective entity, but a corporation set up solely as

a vehicle for Donohue's business ventures, and of which he is the sole shareholder and employee. However, in *Bellis, supra*, at 100, the Supreme Court stated that "[i]t is well settled that no privilege can be claimed by the custodian of corporate records, regardless of how small the corporation may be;" *see also Reamer v. Beall*, 506 F.2d 1345 (4th Cir.), *cert. denied*, 420 U.S. 955 (1975). Consequently, if the receipt is a corporate document, Donohue cannot successfully avoid its production by asserting his Fifth Amendment privilege.

The receipt containing nineteen items is dated November 9, 1979 and lists categories of documents submitted by Donohue to the government on that date. These documents were submitted pursuant to a subpoena issued on October 26, 1979 and addressed to "Custodian of Records, James J. Donohue and Associates, Inc."[3] An attachment to this subpoena lists the materials which the government sought to obtain from Donohue, and it is clear from this list that the documents sought were corporate documents of James J. Donohue and Associates, Inc. and not Donohue's personal papers.[4]

Many of the documents listed on the receipt itself also appear to be corporate in nature. Testimony presented at the evidentiary hearing on this matter reveals that James J. Donohue and Associates, Inc. is in the business of leasing commercial properties in Washington, D.C. Among

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[3] Government Exhibit 1.

[4] The attachment reads as follows:

Any and all original (sic) and all copies made before service of this subpoena in the actual or constructive possession of James J. Donohue and Associates, Inc., for the period January 1, 1973, through December 31, 1978, as listed below:

1. All corporate ledgers and journals including but not limited to the general ledger, cash receipts journal, sales journal, cash disbursements journal, general journal, payroll journals, voucher register, and any other ledgers and journals maintained by the corporation.

2. All banking records, including but not limited to bank statements, cancelled checks, check vouchers, check books, stubs and/or registers, deposit tickets, savings account books, certifi-

the items enumerated on the receipt are several letters of agreement from various business entities, leases, cancelled checks, bank statements, corporate minute books, and the Certificate and Articles of Incorporation of James J. Donohue and Associates, Inc. It is true that the last item on the receipt containing twenty entries is Donohue's diaries for the years 1973 through 1978 and, as will be discussed more fully below, these diaries are at least

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cates of deposit and any other time deposits purchased or redeemed and records of any safe deposit boxes.

3. All records of loans and mortgages received and given by the corporation, including any and all correspondence related to such loans.

4. All corporate minutes and/or other records or recordings, of any kind whatsoever, of corporate meetings and the corporate charter including any revisions and amendments.

5. All financial statements.

6. Corporate stock ledgers.

7. All consulting and commission contracts between the corporation and its clients, copies of all leases and contracts negotiated for clients, all billing invoices submitted to clients.

8. All records relative to the acquisition or sale of real and/or leasehold property either improved or unimproved; including purchase contracts, settlement sheets, contracts of sale, deeds, mortgages, deeds of trust, and correspondence, memoranda, notes of meetings and/or telephone calls relating to or connected in any way with the acquisition or sale of property.

9. All records relating to or connected in any way with the corporation's legal or equitable ownership of personal property, stocks and bonds.

10. All records relating to construction loan agreements, mortgages, draws, fees, permanent financing commitments and any and all correspondence, memoranda, notes of meetings and/or telephone calls relating thereto.

11. All correspondence, memoranda, notes of meetings and/or telephone calls relating to or connected in any way with communications with employees or officials of federal, state or local governments by any corporate employee, agent or consultant or anyone else acting on behalf of the corporation.

12. All personnel files of current and former employees and consultants.

13. All Form 1099 and Form 941 returns filed by the corporation.

14. All invoices billed to the corporation for the acquisition of property, services and operating expenses.

arguably personal documents. It is not at all clear, however, how this twentieth item came to appear on the photocopy of the receipt produced by Mr. Barron on November 3, 1980. In any event, the vast majority of the items listed on the receipt are corporate records, and the receipt reflects documents submitted in response to a subpoena directed to the custodian of corporate records and seeking the production of records in the possession of the corporation. Considering all the evidence available, it is the court's finding that the original receipt sought by the government is a corporate document within the meaning of *Bellis v. United States, supra*, and that the Fifth Amendment privilege against self-incrimination does not apply to its production.

Even if the original receipt was a personal document, this court wuld still hold that its production is not privileged. In *Fisher v. United States, supra*, the Supreme Court discussed the application of the Fifth Amendment privilege to private papers; the Court stated that

> the Fifth Amendment does not independently proscribe the compelled production of every sort of incriminating evidence but applies only when the accused is compelled to make a *testimonial* communication that is incriminating. We have, accordingly, declined to extend the protection of the privilege to the giving of blood samples, *Schmerber v. California*, 384 U.S. 757, 763-764 (1966); to the giving of handwriting exemplars, *Gilbert v. California*, 388 U.S. 263, 265-267 (1967); voice exemplars, *United States v. Wade*, 388 U.S. 218, 222-223 (1967); or the donning of a blouse worn by the perpetrator, *Holt v. United States*, 218 U.S. 245 (1910).

Id. at 406 (footnote omitted, emphasis in original). The Court went on to explain that privileged testimonial communications might inhere in the contents of the subpoenaed documents themselves, or in the communicative aspects of the act of producing evidence in response to a subpoena. The communicative aspects of producing documents include the tacit concessions that the docu-

ments sought exist, are in the possession or control of the subpoenaed party, and that the subpoenaed party believes the documents produced to be the items described in the subpoena; *Id.* at 409-410. Only where self-incriminating testimony would be communicated by the production of subpoenaed documents does the Fifth Amendment privilege apply.

In the case at bar, production of the receipt would not involve testimony about any matter of which the government does not have independent proof. Government witnesses have testified that Donohue retained the original receipt he allowed I.R.S. agents to photocopy on November 9, 1979, and Mr. Barron has testified that he received the photocopy of the receipt he produced to the grand jury on November 3, 1980 from Donohue on October 29, 1980. Thus, there is ample extrinsic proof of the existence of the receipt and Donohue's possession of it.

Furthermore, if Donohue does produce an original receipt, it can be authenticated without reference to the identification implied in Donohue's turning it over. Both photocopies currently in the government's possession contain typed and handwritten words. W. Garret Kanaski, an expert document examiner called by the government, testified that the spatial relationship of the handwriting to the typed entries was identical on both the twenty and nineteen item receipts, and that this could only be so if both were photocopies of the same original. Similarly, any document submitted by Donohue can be compared against the two photocopies in the government's possession to determine whether or not it is indeed the original from which the photocopies were made.

Finally, the contents of the receipt will not be communicated by its production. The government already possesses both a nineteen item and a twenty item version of the receipt, and does not seek the original so that it can read what it says. Rather, as Mr. Kanaski's testimony indicated, the government seeks the original receipt in order to perform certain tests that will enable it to learn

more about the creation of the document. In this regard, the receipt strikes the court as similar to the blood samples and voice and handwriting exemplars cited by the Supreme Court in *Fisher, supra*, as examples of compelled production of incriminating evidence to which the Fifth Amendment privilege does not apply.

For these reasons, both because it is a corporate document and because production would involve no testimonial communication, this court holds that the Fifth Amendment privilege against self-incrimination does not apply to the original receipt sought by the government's subpoena of November 7, 1980.

II. The Diaries

The government's subpoena demands the production of any and all diaries for the years 1973 through 1978. Although the government initially asserted that it was entitled to these diaries whether found by the court to be corporate or personal in nature, the government has retreated from that position and now seeks production of the diaries only if the court finds them to be corporate documents; *see Bellis v. United States, supra*. Thus, the only issue before the court in this regard is the nature of the diaries.

The precise contents of the diaries in question are not known to the court.[5] The testimony of Clarkson Richard Sherwood, a tax consultant hired by Donohue to assist him

[5] Donohue's 1979 diary has been introduced as Government Exhibit 66. The government asserts that the court should not consider the contents of this diary as indicative of the nature of the 1973-1978 diaries, because it believes the 1979 diary is fraudulent. No evidence as to the credibility of the 1979 diary has been presented. Examination of the 1979 diary reveals a listing of several appointments, with receipts from what appear to be bars and restaurants. The court does not find these entries, standing alone, helpful in determining whether to characterize Donohue's 1973-1978 diaries as personal or corporate records. The court does note, however, that it finds nothing in the 1979 diary that is inconsistent with the conclusion it reaches regarding the 1973-1978 diaries.

in preparing his personal tax returns, does,however, indicate that the diaries were maintained by Donohue and contained information pertinent to his personal income tax liability.[6] Furthermore, the corporate minutes of James J. Donohue and Associates, Inc. state that Donohue is not to be reimbursed by the corporation for expenses incurred in the course of conducting his business.

The government's initial position was that the diaries should be characterized as corporate documents because they probably contained information regarding the tax liability of James J. Donohue and Associates, Inc. In the light of Mr. Sherwood's testimony and the provisions of the corporate minutes noted above, the government no longer makes this contention. rather, the government argues that Donohue's diaries contain information about his business meetings, and that because these meetings were attended in a business capacity, listings of them should be deemed corporate records.

The court does not find the government's reasoning persuasive. The mere fact that business appointments are noted in a diary does not render the diary a corporate record; it strains logic to regard Donohue as the corporate custodian of his own diaries. It seems quite reasonable to the court that the diaries could contain a schedule of business appointments, but still be kept for personal purposes. There is no evidence in this case that the diaries sought by the government were maintained to further any corporate purpose; the closest the government has come to such evidence are its own assertions that Donohue must have needed to keep a list of appointments in order to carry on his business effectively. There is evidence, on the other hand, that the diaries in question were maintained by Donohue as records pertinent to his personal income tax liability.

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[6] Government Exhibits 46 throught 52 are workpapers used by Mr. Sherwood to prepare Donohue's personal tax returns, and indicate amounts calculated from Donohue's diaries.

The government directs the court's attention to *In Re Grand Jury Witness* (Molina), 552 F.2d 898 (9th Cir. 1977) as support for its position that Donohue's diaries are properly characterized as corporate records. Molina was the banquet manager of the San Francisco Hilton Hotel. Patrons of the hotel's banquet facilities paid gratuities to the hotel's management, which then forwarded cast to Molina for distribution to his staff. Molina was called to testify before a grand jury investigating possible violations of federal labor laws restricting payments made by employers to employee bargaining representatives, and stated that he had maintained records documenting the disbursement of banquet gratuities to his staff. When these records were subpoenaed, Molina asserted that they would tend to incriminate him with respect to his personal income tax obligations, and claimed the Fifth Amendment privilege. The court rejected Molina's claim, finding that the subpoenaed records were corporate documents. The court reasoned that by virtue of his position, Molina was given the responsibility by the hotel of carrying out its obligations to distribute gratuities properly, and noted that Molina forwarded lists of disbursements to the hotel's accounting office. Thus, the court concluded that Molina was acting as paymaster-agent for the hotel and that the records sought belonged to the hotel corporation.

The case at bar is distinguishable from *Molina*. In *Molina*, the records sought were maintained because they documented the hotel corporation's satisfaction of its contractual obligations to its employees; the records were maintained for the benefit of the corporation, not for Molina. The relevance of the records to Molina's personal income tax liability was tangential; presumably, the records documented gratuities received by Molina which he neglected to declare. In the case before this court, no corporate purpose was served by Donohue's keeping receipts from his appointments in a diary, and these receipts are of no relevance to any obligation of James J. Donohue and Associates, Inc. The evidence indicates that Donohue maintained the diaries for a personal purpose: to

document possible deductions from his personal income tax debt.

For these reasons, the court concludes that Donohue's diaries are personal documents. As noted above, the government has adopted the position that if the court deems the diaries to be personal records, it will not pursue its subpoena as to them. Consequently, Donohue will not be required to produce his diaries for the years 1973 through 1978.

III. Attorney-Client Privilege

During the course of these proceedings, Mr. Donohue, through counsel, raised the issue of attorney-client privilege with regard to the government's use of Mr. Barron's testimony, both before the grand jury on November 3, 1980 and during the evidentiary hearing conducted by this court on Donohue's motion to quash the government's subpoena. The court has already ruled from the bench on this matter, but takes this opportunity to make its ruling part of the written record in this case.

In order for the attorney-client privilege to apply to a communication, the client must intend that the communication be confidential; *e.g.*, 8 Wigmore, *Evidence*, § 2311 (Mcnaughton rev. 1961):

> The privilege assumes, of course, that the communications are made with the intention of confidentiality. The reason for prohibiting disclosure . . . ceases when the client does not appear to have been desirous of secrecy . . . This much is universally conceded.
>
> No *express* request for secrecy, to be sure, is necessary. But the mere relation of attorney and client does not raise a presumption of confidentiality (emphasis in original; footnotes omitted).

Having considered the testimony of Dean Barron and Donohue, this court finds that Donohue did not intend his communications to Mr. Barron to be confidential. Perhaps

the most compelling evidence in this regard is the following response offered by Donohue to a question put by the court:

> Dean Barron . . . said you could be getting into deep water here, and my comment to Dean Barron was, I would like to put this whole thing behind me so whatever I have got, let's let it all hang out, and there may have been some additional words, but basically, that was the conversation we had. I said, I have nothing to cover up; let's put it all out there.[7]

Because this court finds that Donohue never intended his communications with Mr. Barron to be confidential, the attorney-client privilege cannot apply to these communications. For this reason, the court permitted Mr. Barron to testify during the evidentiary hearing on Donohue's motion to quash, and will deny Donohue's motion for a protective order requiring that a new grand jury be impanelled and that the government be prohibited from presenting to it Mr. Barron's grand jury testimony of November 3, 1980.

HERBERT F. MURRAY,
United States District Judge.

Dated: February 11, 1981.

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[7] Transcript, Dec. 18, 1980, Vol. II, pp. 47-48.

In The United States District Court
For The District of Maryland

Civil HM 81-113

In Re: July 1979 Term Special
Grand Jury (Donohue)

ORDER

Upon the motions of James J. Donohue for a protective order and to quash the subpoena issued against him by the United States government on November 17, 1980, it is this 11th day of February 1981, by the United States District Court for the District of Maryland.

ORDERED:

(1) that the motion of James J. Donohue for a protective order shall be, and the same hereby is, *denied;*

(2) that the motion of James J. Donohue to quash the government's subpoena shall be, and the same hereby is, as to Mr. Donohue's diaries for the years 1973 through 1978, *Granted,* and as to the original receipt dated November 9, 1979, *Denied;* and

(3) that the Clerk of the Court shall mail copies of this Memorandum and Order to the parties.

HERBERT F. MURRAY,
United States District Judge.

APPENDIX B

In the United States District Court
for the District of Maryland

Civil No. HM81-113

In re July 1979 Term Special
Grand Jury (Donohue)

MEMORANDUM

On November 7, 1980, the United States government issued a grand jury subpoena to James J. Donohue, custodian of records, requiring Mr. Donohue to produce certain enumerated diaries and a receipt for documents previously produced to the government. Asserting his privilege not to incriminate himself as guaranteed by the Fifth Amendment to the United States Constitution, Mr. Donohue filed a motion to quash the subpoena on November 14, 1980. This court scheduled an evidentiary hearing to determine the merits of Mr. Donohue's motion which, after several continuances, eventually concluded on January 23, 1981.[1]

On February 11, 1981, this court entered a memorandum and order addressed to Mr. Donohue's fifth amendment claims. Although the court determined that Mr. Donohue had properly invoked the privilege with respect to his diaries, it further ruled that the receipt sought by the government was not subject to fifth amendment

[1] The hearing in this matter took place on the following dates: November 14, 1980; December 18, 1980; January 7, 1981; January 8, 1981; January 13, 1981; and January 23, 1981.

protection. In light of the court's holding, the government issued a new subpoena to Mr. Donohue, requiring him to appear before the grand jury on February 26, 1981 and to produce the receipt sought by the government's prior subpoena at that time.

Mr. Donohue appeared before the grand jury as scheduled. He did not, however, produce the receipt sought by the government. Rather when asked if he had the receipt, Mr. Donohue told the grand jury that he did not. The parties then appeared before this court along with the members of the grand jury to document Mr. Donohue's refusal to produce the receipt; *see In re Hitson*, 177 F. Supp. 834, 838 (N.D. Cal.), *rev'd on other grounds sub nom. Shane v. United States*, 283 F.2d 355 (9th Cir. 1960). The court reporter assigned to the grand jury on that day was called as a witness, and played a tape recording of Mr. Donohue's statements to the grand jury. In pertinent part, Mr. Donohue's testimony was as follows:

> By Assistant United States Attorney Goldstein:
>
> Q. Mr. Donohue, the subpoena calls for you to produce the original and any and all copies, predating the subpoena, either in your actual or constructive possession, of a receipt prepared on behalf of James J. Donohue and Associates, Inc. by James J. Donohue, which receipt is dated November 9th, 1979, and purported to be the records supplied in response to a Grand Jury *subpoena duces tecum* of the Special Grand Jury of July 1979, dated October 6th, 1979 and returnable on November 9, 1979.
>
> Mr. Donohue, on behalf of the Grand Jury, I ask you at this time to produce the documents called for by the subpoena. A. May I make a statement?
>
> Q. You may be permitted at some point to make a statement. At this time, you are simply requested to produce the documents called for by the subpoena. Do you have those records with you, sir? A. I have an affidavit which was given to the Internal Revenue Service.

> Q. Mr. Donohue, you are not being asked at this point to answer any questions. You are simply being asked, do you have the receipt called for by the subpoena to be produced to the grand jury. A. I do not have that receipt.[2]

Mr. Donohue was then called as a witness, and in response to the court's questions, reiterated his contention that he did not have the receipt sought by the government and that he could not, therefore, produce it before the grand jury. The government at this point presented to the court and to Mr. Donohue a notice to show cause why Mr. Donohue should not be cited for contempt of court pursuant to 28 U.S.C. § 1826.[3] A contempt hearing was scheduled, and took place on Friday, March 13, 1981.

Before civil contempt sanctions may be invoked, the court must be persuaded by clear and convincing evidence of the defendant's contempt; *e.g., Sigety v. Abrams*, 632 F.2d 969, 974-975 (2d Cir. 1980); *United States v. Powers*, 629 F.2d 619, 626 n.6 (9th Cir. 1980); *United States v. Rizzo*, 539 F.2d 458, 465 (5th Cir. 1976). In demonstrating a defendant's ability to comply with a subpoena *duces tecum*, the government may properly draw an inference of continuing possession of books and records from evidence

[2] Tr., February 26, 1981 at 17-18.

[3] 28 U.S.C. § 1826(a) provides as follows:

> § 1826. Recalcitrant witnesses
>
> (a) Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of—
>
> (1) the court proceeding, or
>
> (2) the term of the grand jury including extensions, before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months.

of possession at a previous point in time; *e.g., Sigety v. Abrams, supra* at 974, and cases cited therein. However, "[t]he presumption is . . . no more than a common-sense inference, as strong or as weak as the nature of the surrounding circumstances permits," *United States v. Patterson*, 219 F.2d 659, 661 (2d Cir. 1955).

Background Facts

On October 29, 1979, the government served a grand jury subpoena *duces tecum* directed to the custodian of records for James J. Donohue and Associates, Inc., calling for certain documents to be produced on November 9, 1979. Mr. Donohue submitted a number of documents to the government in response to this subpoena, and also presented a previously prepared typed receipt listing the documents produced. The government contends that this receipt listed nineteen categories of documents, and that although it retained a photocopy of the receipt, it returned the original to Mr. Donohue.

On October 20, 1980, the government wrote to Mr. Donohue and requested that he produce various documents. Donohue, following receipt of this letter, arranged for Dean Barron, his attorney at the time, to represent him with respect to the government's grand jury investigation. On November 3, 1980, Mr. Barron submitted several documents to the government on Mr. Donohue's behalf, among them a receipt for documents submitted to the government on November 9, 1979. This receipt, a photocopy, listed twenty categories of documents, the last of which reads, "Daily Diaries: 1973-74-75-76-77-78."

The government now has in its possession two photocopies of receipts for documents turned over by Donohue to the government on November 9, 1979. The receipts are identical except that the first lists nineteen items and is not signed,[4] whereas the second receipt lists twenty items and contains the dated signature of Internal Revenue Service Special Agent May under the words "Receipt

[4] Hearing, Motion to Quash, Government Ex. 3.

Acknowledged."[5] It is the original receipt which is the subject of the government's pending subpoena and which Mr. Donohue asserts he does not possess.

The Government's Proof of Donohue's Possession of the Receipt

To meet its burden of proving Mr. Donohue's possession of the original receipts, the government relies primarily upon evidence presented at the hearing on Mr. Donohue's motion to quash. At the hearing held on March 13, 1981, Mr. Donohue testified that he appeared at the United States Attorney's office in Baltimore on November 9, 1979 and surrendered a box of subpoenaed documents to I.R.S. Special Agent May and Revenue Agent Marvin Case. Mr. Donohue further testified that he brought with him on that day a typed receipt for the documents surrendered, and that Special Agent May signed the receipt after he and Agent Case satisfied themselves that the items listed on the receipt corresponded accurately to the documents actually produced.[6]

Special Agent May was called as a witness by the government on January 8, 1981. Agent May also testified that he and Agent Case received documents from Mr. Donohue on November 9, 1979, and that Donohue requested that one of the agents sign a receipt that he had prepared in advance and brought with him on that date. Agent May then stated that after making an inventory of the documents produced, he photocopied the receipt, signed the original, and returned the original to Mr. Donohue.[7,8] It is from this testimony that the government

[5] Hearing, Motion to Quash, Government Ex. 2.

[6] As of the date of this memorandum and order, the transcript of the proceedings held on March 13, 1981 has not been prepared. The description of the evidence presented on that date is based upon the court's recollection of it.

[7] Tr., Vol. IV, Jan. 8, 1981 at 76-77.

[8] Counsel for Mr. Donohue directs the court's attention to the testimony of Agent Case that Special Agent May gave Donohue a "copy" of the receipt. The pertinent portion of Agent Case's testimony is as follows:

urges the court to infer that Mr. Donohue remains in possession of the original receipt, and thus has the ability to produce it at this time.

Donohue's Contention With Regard to the Receipt

At the hearing held on March 13, 1981, Mr. Donohue took issue with Special Agent May's version of the events of November 9, 1979. Donohue asserted that Agent May signed the receipt before photocopying it, and that May returned the photocopy, not the original, to him. Mr. Donohue further testified that the receipt contained twenty items, not nineteen, the twentieth being his diaries for the years 1973 through 1978.[9]

Had Mr. Donohue contended that he misplaced or destroyed the original receipt during the twelve months that elapsed between Special Agent May's signing the receipt and the government's issuing a subpoena for it, the

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BY MR. HOPKINS:

Q. Did Mr. May sign the receipt in your presence? A. Yes, sir.

Q. Did he make copies of the receipt? A. If I remember correctly, he took the receipt out of the room, because the xerox machine is down the hall, and took it down there and copied it.

Q. Came back and gave a copy to Mr. Donohue? A. Yes, sir.

Q. And he retained a copy? A. Yes, sir.

Tr., Vol. V, Jan. 13, 1981 at 7. Viewed in context, the court does not find Agent Case's testimony to be inconsistent with that of Special Agent May. It appears to the court that Agent Case merely neglected to distinguish between the original receipt and the photocopy made by Agent May. Furthermore, even if their testimony was found to be inconsistent, the court would ascribe greater weight to the statements made by Special Agent May than to those of Agent Case, because May was the agent who photocopied the receipt, signed it, and returned the receipt to Mr. Donohue.

[9] *See*note 6, *supra*. On February 13, 1981, Donohue submitted an affidavit to the Internal Revenue Service, the allegations of which are essentially identical to those made in his direct testimony before this court on March 13, 1981; Contempt Hearing, Government Ex. 1.

court might have been confronted with a difficult question of fact; the inference of continuing possession weakens over time. *See United States v. Patterson, supra.* Viewed in light of all the evidence adduced in this matter, however, the court has no trouble concluding that Mr. Donohue's contention that he never received the original receipt from Special Agent May is without credibility.

First, Agent May's assertion that the original receipt was returned to Mr. Donohue is buttressed by the testimony offered by Dean Barron, Esquire and that of W. Jerry Kanaskie of the Federal Bureau of Investigation. As was noted above, Dean Barron represented Mr. Donohue in connection with a request by the government for documents. Mr. Barron testified that Donohue brought several documents to his office on October 29, 1980, and that among them was a photocopy of the receipt dated November 9, 1979, listing twenty items. Mr. Barron further testified that sometime after November 4, 1980, he had a discussion about the documents sought by the government with Mr. Donohue, and that Donohue "said he was searching [his] files to locate the original receipt which was called for in the subpoena."[10] Mr. Barron's statements in this regard are corroborated by his testimony before the Special Grand Jury on November 7, 1980.[11] This court cannot understand why, if Mr. Donohue is certain he received a copy of the November 9, 1979 receipt and not the original, he would have told his attorney that he would search his files in an effort to locate the original receipt. Thus, Mr. Barron's testimony is, in the court's view, persuasive evidence that Donohue is not being truthful in asserting that he never received the original receipt from Agent May.

The testimony of Agent Kanaskie of the F.B.I. lends further support to Special Agent May's version of the events in issue. Agent Kanaskie is an expert document

[10] Tr., Vol. IV, Jan. 8, 1981 at 67.

[11] Hearing, Motion to Quash, Donohue Ex. 2 at 34.

examiner. His testimony before this court was that items twenty on the November 9, 1979 receipt was probably typed on the original receipt and not on a photocopy.[12] Special Agent May has testified that Mr. Donohue gave him a receipt listing nineteen items,[13] and May's testimony is buttressed by Agent Case's statement that the diaries described in item twenty of the receipt were not produced on November 9, 1979.[14] Dean Barron, on behalf of Donohue, presented a photocopy of the November 9, 1979 receipt containing twenty items to the grand jury.[15] The twentieth item listed was, of course, Mr. Donohue's diaries for the years 1973 through 1978.

These facts give rise to suspicion about Mr. Donohue's credibility, because it appears quite likely that a twentieth item was added to the original receipt sometime after November 9, 1979, and Mr. Donohue may very well have had a motive to alter the nineteen item receipt. Clarkson Sherwood testified that he has worked as a tax consultant for Donohue for approximately twenty-five years. He further stated that Donohue took deductions on his personal income tax returns for business expenses, and that the amounts of these deductions were derived from Mr. Donohue's diaries. Mr. Sherwood testified that he never saw Donohue's diaries for the years 1974 through 1979;[16] rather than showing Mr. Sherwood his diaries, Donohue merely conveyed the information they contained to him. If these diaries in fact never existed, it would certainly be in Donohue's interests to persuade the government that he had surrendered them in response to a subpoena in November of 1979.

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[12] Tr., Vol. IV, Jan. 8, 1981 at 138, 151-152. Agent Kanaskie qualified his opinion as not being "positively 100 percent." *Id.* at 152.

[13] Tr., Vol. IV, Jan. 8, 1981 at 79.

[14] Tr., Vol. V, Jan. 13, 1981 at 10. Agent Case was not directly asked how many items were listed in the receipt.

[15] Hearing, Motion to Quash, Donohue Ex. 17.

[16] Tr., Vol. IV, Jan. 8, 1981 at 164-167.

Furthermore, if Mr. Donohue's assertion that the November 9, 1979 receipt has always contained twenty items is accepted as true, the government's possession of a photocopy of the receipt listing nineteen items can be explained only by resort to a theory of governmental fraud. This court would be reluctant to reach such a conclusion unless confronted with unusually compelling evidence; in the case at bar, there is no evidence at all, apart from the receipt itself, to support such a theory.

Finally, the court has had the opportunity to examine Mr. Donohue's demeanor on the witness stand, and has found him to be evasive and unconvincing, particularly so during the hearing held on March 13, 1981.[17] In contrast, Agent May's demeanor gave the court no reason to doubt his credibility.

Conclusion

The government has subpoenaed the original receipt dated November 9, 1979. The court has already ruled that Mr. Donohue cannot assert the fifth amendment privilege to avoid production of the receipt. Mr. Donohue now contends that he cannot comply with the government's subpoena because he does not have the receipt. The court does not believe Mr. Donohue, and finds that there is clear and convincing evidence to support the government's assertion that he does possess the original receipt. For these reasons, this court finds Mr. Donohue in contempt of court pursuant to 28 U.S.C. § 1826, and will direct that Mr. Donohue be confined to the custody of the United States Attorney General until the original receipt is produced, or until the expiration of the term of the December 1980 Term Special Grand Jury, whichever first occurs, but in no event for a period longer than eighteen months.

HERBERT F. MURRAY
United States District Judge.

Dated: March 17, 1981.

[17] *See* note 6, *supra*.

APPENDIX C

United States Court Of Appeals
for the Fourth Circuit

No. 81-1218

In Re: July 1979 Term Special Grand Jury
in the matter of James J. Donohue

United States of America,
Appellee,
v.
James J. Donohue,
Appellant.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Herbert F. Murray, District Judge.

Argued: April 7, 1981. *Decided: April 10, 1981.*

Before RUSSELL, HALL and SPROUSE, Circuit Judges.

Albert Ahern, Jr.; Christopher M. Hopkins (Hall, Surovell, Jackson & Colten, P.C.: Alan I. Baron, Robert Levin, Frank, Bernstein, Conaway & Goldman on brief) for Appellant; Daniel F. Goldstein, Assistant United States

Attorney (Russell T. Baker, Jr., United States Attorney, Elizabeth H. Trimble, Assistant United States Attorney on brief) for Appellee.

PER CURIAM:

This appeal involves the issuance of a grand jury subpoena duces tecum directing the appellant to appear and produce a certain original receipt dated November 9, 1979. Upon appellant's failure to produce the original receipt and his denial of the possession of the original receipt, after hearing, the district court found "that there is clear and convincing evidence to support the government's assertion that he [James J. Donohue, the appellant] does possess the original receipt" and found the appellant "in contempt of court pursuant to 28 U.S.C. § 1826." Upon consideration of the briefs, oral arguments and the record, it is our opinion that the findings of the district court are not clearly erroneous, and accordingly the judgment of the district court is

Affirmed.

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No. 81-137

In the Supreme Court of the United States

OCTOBER TERM, 1980

JAMES J. DONOHUE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 81-137

JAMES J. DONOHUE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner seeks review of the decision below holding him in contempt for refusing to comply with a grand jury subpoena and ordering him incarcerated until such time as either he should purge himself of his contempt or the grand jury term should expire.

1. The pertinent facts may be summarized as follows: In response to an October 29, 1979, grand jury subpoena directed to petitioner in his capacity as custodian of corporate records, petitioner produced certain documents of his wholly-owned corporation, James J. Donohue Associates, Inc., and was given a signed receipt for the items tendered. By letter dated October 20, 1980, he was requested to produce his diaries for 1973 through 1979. He voluntarily produced his 1979 diary, but asserted that he had already produced the 1973 through 1978 diaries and offered as proof of his production a copy of the previously given receipt, which listed those diaries as the final entry (Item

20). However, the copy of the receipt retained by the grand jury contained only 19 items (Pet. App. 2a-3a). Accordingly, a subpoena was issued directing petitioner to produce the original and all copies of the November 1979 receipt.[1] Petitioner filed a motion to quash the subpoena and refused to respond to questions about the receipt before the grand jury, claiming his Fifth Amendment privilege (Pet. App. 1a). At a hearing before the district court, petitioner contended that the receipt was a personal record and therefore encompassed by his Fifth Amendment privilege against self-incrimination. The district court rejected petitioner's claim. It found that the receipt was a corporate record of which petitioner was a custodian and that it was not protected by petitioner's personal Fifth Amendment privilege (Pet. App. 4a-6a).

In light of the district court's holding, a new subpoena was issued requiring petitioner to appear before the grand jury on February 26, 1981, and to produce the receipt. In response to the new subpoena, petitioner appeared before the grand jury and asserted that he had never received the original receipt. This testimony, repeated in open court at a contempt hearing and contradicted by the government's evidence, was not believed by the district court. On the basis of all the evidence before it, including testimony by petitioner's attorney, the court ruled petitioner's testimony to be "without credibility" (Pet. App. 20a) and held him in civil contempt (*id.* at 14a-22a).

Petitioner appealed from the contempt order, raising several issues with respect to the ruling on his credibility and

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[1]The first subpoena also commanded petitioner to produce the 1973 through 1978 diaries. The district court held the diaries were personal records, the compelled production of which would violate petitioner's privilege against self-incrimination, and, accordingly, refused to order them produced (Pet. App. 11a).

the procedures followed by the district court. The court of appeals affirmed (Pet. App. 23a-24a). It held that the district court's finding that " 'there is clear and convincing evidence * * * that [petitioner] does possess the original receipt' " was not clearly erroneous.

2. Petitioner seeks (Pet. 6, 10) review by this Court of the decision below to consider the scope of the Fifth Amendment's protections against compulsory production of "non-business" (*i.e.*, personal) records in the claimant's possession and to determine the limits of the privilege under *Fisher* v. *United States*, 425 U.S. 391, 398 (1976), when the existence of a subpoenaed document is in dispute. His arguments supporting these contentions are premised on the assumption that the subpoenaed receipt is a personal record and that its existence is in doubt. The district court, however, correctly determined the receipt in question to be a corporate record that was not subject to the protections of the corporate officer's personal claim of privilege, and it rejected petitioner's unsupported assertion that he never received the receipt. These findings are supported by the record (Pet. App. 4a-6a, 18a-22a), and review by this Court of these factual issues is unwarranted.

Contrary to petitioner's assertion (Pet. 6-10), any conflict that may exist between *In re Grand Jury Proceedings United States*, 626 F. 2d 1051, 1056 (1st Cir. 1980), and *United States* v. *Davis*, 636 F. 2d 1028, 1041 (5th Cir. 1981), is not implicated by the decision below. Unlike here, in both those cases, it was established as a factual matter that the claimant of the privilege was, or might have been, incriminated by the testimonial aspects of producing *personal* papers. Indeed, the First Circuit in *In re Grand Jury Proceedings United States* explicitly recognized that a custodian of corporate records, such as petitioner, could not assert a Fifth Amendment privilege with respect to those records (626 F. 2d at 1056). The decision below followed

the well-established rule that the testimonial aspects of authentication and identification inherent in producing corporate documents are unprivileged, because they are ancillary to the production of the documents (*Curcio* v. *United States*, 354 U.S. 118, 125 (1957)), and thus not "deemed to be sufficiently testimonial for purposes of the privilege" (*Fisher* v. *United States, supra*, 425 U.S. at 410-411). See *Bellis* v. *United States*, 417 U.S. 85 (1974).[2]

3. Finally, petitioner contends (Pet. 10-11) that his incarceration was inappropriate under 28 U.S.C. 1826 because he had shown just cause by giving testimony, subject to cross-examination, that he never received the document in question. That statute permits summary incarceration for civil contempts "[w]henever a witness * * * refuses without just cause shown to comply with an order of the court" to produce subpoenaed records. The district court found (Pet. App. 20a), however, that petitioner's testimony in this regard was "without credibility." Indeed, just cause for failing to comply with a subpoena cannot be shown by the contemnor's "own denials which the court finds incredible in context." *Maggio* v. *Zeitz*, 333 U.S. 56, 75-76 (1948). Accordingly, 28 U.S.C. 1826 does not divest the trial court of its authority and responsibility to consider the credibility of a witness.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

SEPTEMBER 1981

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[2]Accordingly, petitioner's factual objection (Pet. 9-10) to the district court's alternative holding that production of the receipt would not be testimonial does not warrant review because the finding that the subpoenaed receipt is a corporate record is dispositive.

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